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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 541 1

EDWARD B. DOUGLAS,

Petitioner,

vs.

LEVI M. WILLCUTS, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MINNESOTA,

Respondent.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Comes now the above named Petitioner, Edward B. Douglas, and presents this, his Petition for a Rehearing of the Petition for Certiorari in this case.

I.

The Petition for Certiorari was filed November 26, 1934, and was denied January 7, 1935. This Petition, although more than twenty-five days have elapsed since the denial of the Petition for Certiorari, is presented during the term when said Petition was denied and hence, as Petitioner believes, at a time when this Court has power to receive and consider the same upon its order. Rule 33, 286 U. S. 619, 28 U. S. C. A., *1934 Cumulative Annual Pocket Part*, p. 35.

II.

REASONS FOR PETITION FOR REHEARING.

Conflict Between Circuits Now Clearly Exists.

On February 23, 1935, the Circuit Court of Appeals of the Seventh Circuit rendered its decision in *Edmund O. Schweitzer vs. Commissioner of Internal Revenue*, Nos. 5323, 5324, ... F. (2d) ...., 1935 Prentice Hall Federal Tax Service, Par. 941; 353 Commerce Clearing House, Par. 9163; reversing 30 B. T. A. 155, that the grantor of trusts for the support, maintenance, and education of dependents whom he was legally obligated to support, maintain, and educate was not taxable on the income of the trusts under Sections 22, 166 and 167 of the *Revenue Act of 1928*, 45 Stat. 797 and 849, 26 U. S. C. A., Pars. 2022, 2166 and 2167. In so doing the Court expressly repudiated the principle that income of a fund irrevocably transferred in trust for the benefit of a dependent whom the grantor is legally obligated to support and maintain is taxable to the grantor, which controlled the decision of the Circuit Court of Appeals of the Eighth Circuit in Petitioner's case. *Willcuts vs. Douglas*, 73 F. (2d) 130. In the *Schweitzer* case the dependents are the minor children of the grantor, while in Petitioner's case the dependent is Petitioner's divorced wife.

In rejecting the principle aforesaid, the Circuit Court of Appeals of the Seventh Circuit says:

> "It (Circuit Court of Appeals of the Eighth Circuit) found that the trust income should be charged to the husband because it directly benefited him by discharging his obligation. No decision has been brought to our attention which supports a principle so broad in its terms. Such a rule would include voluntary payments

by a third party, and we think that was never contemplated by the law. It is obvious that the Court was relying upon that part of the decision in the Wells case which refers to the 'constructive receipt' doctrine, as involved in *Old Colony Trust Company vs. Commissioner,* 279 U. S. 716, and *Boston & Maine Railroad vs. Commissioner,* 279 U. S. 732. In the Old Colony case an employer by a contract of employment paid the income taxes of an employee, and the amount thus paid was included in the employee's gross income, because it was a part of the wage which he was to receive notwithstanding the fact that he did not receive it directly. In the Boston & Maine Railroad case a lessee by the terms of a lease paid all taxes upon the lessor's property or income, and such payments were included in the lessor's income, because it was a part of the consideration moving to the lessor under the lease. In neither of those cases was a trust involved.

"We have no quarrel with the decision in the Willcuts case if the court was of the opinion that the income was in fact owned by the taxpayer, but we feel constrained to disagree with it if the income is charged to him merely because it directly benefited him by discharging his obligation. To so hold we think would directly conflict with sections 161 (b) and 167 of the statutes." (Words in parentheses supplied.)

The Principal Is Involved in Cases Pending in Other Circuits.

The principle formulated by the Circuit Court of Appeals of the Eighth Circuit is involved in *Brooks vs. Commissioner,* 31 B. T. A. 70, on appeal to the Second Circuit; *Hyde*

vs. Commissioner, 31 B. T. A. 57, on appeal to the Second Circuit, and *Tuttle vs. Commissioner,* 31 B. T. A. 151, on appeal to the Sixth Circuit. As applied, it affects every taxpayer who has transferred funds for the benefit of members of his family, it nullifies the trust provisions of the Revenue laws, it imposes liability for taxes without statutory authorization, and has resulted in uncertainty and confusion. These considerations, it is respectfully urged, call for the construction of the income and trust provisions of the Revenue Acts by this Honorable Court.

A Correct Construction Will Result in a Different Disposition of Petitioner's Case.

A correct construction or interpretation of Sections 22, 166 and 167 of the *Revenue Act of 1928, supra,* and Sections 213 and 219 of the *Revenue Act of 1926,* 44 Stat. 23 and 32, 26 U. S. C. A., Pars. 954 and 960 (Note), must have resulted in a different disposition of Petitioner's case.

> "The case of *Willcuts vs. Douglas,* 73 F. (2d) 130, may be distinguishable, but if it is not, then we must respectfully disagree with the Court which decided that case. There the Court apparently failed to appreciate the fact that in the *Wells* case there was specific statutory authority for including in the income of the grantor the amounts applicable to the payment of the insurance premiums."
>
> *Theodore P. Grosvenor, Petitioner, vs. Commissioner of Internal Revenue, Respondent,* 31 B. T. A. 574.

For the foregoing reasons, Petitioner respectfully urges that this Court order an enlargement of the initial period within which Petition for Rehearing may be filed; that a

rehearing of Petitioner's Petition for Certiorari be granted; that upon further consideration the order of January 7, 1935, denying the Petition for Certiorari be revoked; and that the Writ of Certiorari issue.

CLARK R. FLETCHER,
Attorney for Petitioner.

Of Counsel:

LELAND W. SCOTT,

JUNELL, DRISCOLL, FLETCHER, DORSEY & BARKER.

I, Clark R. Fletcher, counsel for the above named Petitioner, Edward B. Douglas, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

CLARK R. FLETCHER.